



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Scopus Optical Industry
File: B-238541
Date: February 23, 1990

Monica Wagner, Esq., Terris, Edgcombe, Hecker & Wayne, for the protester.
Edward J. Korte, Esq., and Bridget A. Stengel, Esq., Department of the Army, for the agency.
Scott Riback, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where firm initially protests to agency the limitation of an acquisition to exclusively domestic firms prior to closing date for receipt of initial proposal, the agency's opening of proposals without taking requested corrective action constitutes initial adverse agency action. Consequently, a protest to the General Accounting Office (GAO) 8 weeks later, based upon agency's written denial of agency-level protest, is untimely under GAO's bid protest regulations.

DECISION

Scopus Optical Industry protests the terms of request for proposals (RFP) No. DAAA09-89-R-1099, issued by the Department of the Army for the acquisition of a quantity of tank periscopes. Scopus, an Israeli firm, argues that the Army improperly restricted the acquisition to exclusively domestic firms pursuant to 10 U.S.C. § 2304(c)(3) (1988). We dismiss the protest as untimely.

By letter dated December 14, 1989, Scopus filed an agency-level protest with the Army alleging that the subject RFP had been improperly restricted exclusively to domestic firms. However, despite the firm's protest, the Army proceeded with the procurement and received proposals on December 15, the scheduled closing date for the receipt of proposals. By a subsequent letter dated January 29, and apparently received by the protester on February 6, the Army denied Scopus' protest and the firm protested to our Office

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on February 8. On February 14, the Army requested that we dismiss Scopus' protest as untimely. The Army states that Scopus' agency-level protest was received by the Army on December 14, that the agency's proceeding with the December 15 closing date constituted adverse action on the protest, and that since Scopus did not file its protest with our Office until February 8, more than 10 working days after that adverse agency action, the protest is untimely.

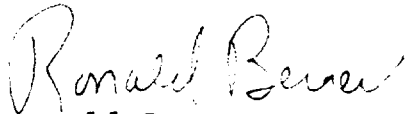
Scopus alleges that the closing date cannot be considered "initial adverse action" because proceeding with closing is basically a passive act, and the protester had no reason to assume that the agency's proceeding with closing meant the agency had rejected its protest. Consequently, Scopus argues that adverse agency action occurred when Scopus received the written denial of its protest. Scopus therefore contends that because it received the Army's denial on February 6, and filed a protest with our Office February 8, its protest was timely.

Where a protest initially has been filed with a contracting activity, any subsequent protest to our Office, to be considered timely under our Bid Protest Regulations, must be filed within 10 working days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3) (1989). The term "adverse agency action" is defined in our Bid Protest Regulations to include the agency's proceeding with the receipt of proposals in the face of the protest. 4 C.F.R. § 21.0(f); Consolidated Indus. Skills Corp., B-231669.2, July 15, 1988, 88-2 CPD ¶ 58 (closing occurring 1 day following filing of agency-level protest constitutes initial adverse agency action). It is our general view that once the contracting activity proceeds with accepting offers, the protester is on notice that the contracting activity will not undertake the requested corrective action; timeliness is thus measured from this point rather than from the receipt of a subsequent formal denial of the agency-level protest. See Carlisle Tire and Rubber Co., B-235413, May 12, 1989, 89-1 CPD ¶ 457.

Contrary to Scopus' position, under our Bid Protest Regulations, adverse agency action may be inferred from either agency "action or inaction." 4 C.F.R. § 21.0(f). Included in that category of adverse agency action is "the receipt of proposals . . . despite the pendency of a protest." Id. In this case, Scopus' agency-level protest requested that the solicitation be modified to allow Scopus, a foreign firm, to participate in the procurement. When the

scheduled time for receipt of proposals passed on December 15, 1989, without modification of the solicitation pursuant to Scopus' request, action clearly prejudicial to Scopus' protest occurred. See Consolidated Indus. Skills Corp., B-231669, supra. Therefore, Scopus' protest, filed with our Office 8 weeks after the closing date, is untimely.^{1/}

We dismiss the protest.



Ronald Berger
Associate General Counsel

^{1/} We note that we rejected a virtually identical protest by Scopus involving the same issue and agency in Scopus Optical Industry--Reconsideration, B-225728.2, et al., June 29, 1987, 87-1 CPD ¶ 639.